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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA
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10 A. Miner Contracting, Inc., an Arizona
corporation,

11 Plaintiff,

12 v.

13 Dana Kepner Company, Inc., a Delaware
14 Corporation; Does 1-50; Black & White
15 Companies; Limited Liability Companies or
Partnerships I-X,

16 Defendant.

No. CV-12-08198-PHX-GMS

ORDER

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18 Pending before the Court is Plaintiff A. Miner Contracting, Inc.’s (“Miner”)
19 Petition to Vacate Arbitration Award and Award of Fees and Costs. (Doc. 1.) For the
20 reasons discussed below, Miner’s Petition is denied.

21 **BACKGROUND**

22 In April 2010, Miner filed suit against Dana Kepner Company, Inc. (“Kepner”)
23 alleging that (1) Kepner had sold Miner defective ductile pipe in connection with a
24 municipal construction project on Prescott (the “Zone-39 Project”) and that (2) Kepner
25 breached the parties’ contract by stopping deliveries to Miner on the Groom Creek
26 Project. (Doc. 6 at 2.) Miner sought damages for tort and contract claims, as well as a
27 declaration that the parties’ contract was invalid. (*Id.* at 2–3.) Miner’s claims regarding
28 the Zone-39 Project center on a meeting held between the parties in March 2009, where

1 Miner alleges that a Kepner representative either affirmatively misrepresented the quality
2 of the pipe or concealed known defects with the pipe. (Doc. 1 at 4–5.) Miner’s claim
3 regarding the Groom Creek Project involves Kepner’s cessation of shipping materials to
4 Miner in 2007, in spite of a contract between the parties and Kepner’s alleged “custom
5 and practice” of giving a customer two to three weeks before placing a credit hold on the
6 customer’s account. (*Id.* at 6.) Kepner counterclaimed against Miner for its failure to pay
7 for materials and filed third-party claims against Guarantee Company of North America
8 (“GCNA”), Miner’s surety company. (Doc. 6 at 3.)

9 In December 2011, the parties agreed to arbitrate the dispute. (*Id.* at 3.) The
10 arbitration was held over three days in February 2012. (*Id.*) On April 3, 2012, the
11 arbitrator issued a Preliminary Award rejecting all of Miner’s claims and finding in favor
12 of Kepner’s counterclaims and third-party claims, awarding Kepner \$201,100 in initial
13 damages jointly and severally against Miner and GCNA. (Doc. 6 at 4; Doc. 1-D at 13–
14 14.) The arbitrator then ordered the parties to brief the issue of attorney’s fees, interest,
15 and costs. (Doc. 6 at 4.) On June 28, 2012, the arbitrator issued a Fee and Cost Award in
16 favor of Kepner. (*Id.* at 5.) This Award incorporated the Preliminary Award and granted
17 Kepner a total of \$626,892.36 against Miner and GCNA, jointly and severally. (*Id.*)
18 Miner paid the full amount of the award shortly thereafter. (*Id.*)

19 Miner now brings suit contending that it is entitled to vacation of the arbitration
20 award because the arbitrator failed to follow controlling legal authority and exceeded the
21 scope of his authority. It argues four grounds for vacating the award: (1) the arbitrator
22 ignored the law on the issue of Kepner’s waiver of timely performance, (2) the
23 arbitrator’s findings on the tort claims were unsupported by the law, (3) the arbitrator’s
24 decision on Miner’s negligent misrepresentation claim had no legal basis, and (4) the
25 arbitrator exceeded his authority in granting Kepner fees and costs.

26 DISCUSSION

27 I. Legal Standard

28 The Federal Arbitration Act enumerates the limited grounds on which a federal

1 court may vacate, modify, or correct an arbitration award. 9 U.S.C. §§ 9, 10. The statute
2 permits vacation only if (1) corruption or fraud was involved, (2) the arbitrators were
3 evidently partial or corrupt, (3) the arbitrators were guilty of misbehavior, or (4) the
4 arbitrators exceeded their powers. *Id.* § 10. Thus, the statute requires confirmation of an
5 award “even in the face of erroneous findings of fact or misinterpretations of law.”
6 *Kyocera Corp. v. Prudential-Bache Trade Svcs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003).
7 In addition, the Ninth Circuit has “adopted a narrow ‘manifest disregard of the law’
8 exception under which a procedurally proper arbitration award may be vacated.” *Collins*
9 *v. D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007).

10 **II. Waiver of Timely Performance**

11 Miner asserts that the arbitrator manifestly disregarded the law on the issue of
12 Kepner’s waiver of timely performance with regard to the Groom Creek Project. In order
13 to obtain vacation of an arbitration award for manifest disregard of the law, the petitioner
14 must show that “the arbitrators recognized the applicable law and then ignored it.”
15 *Collins*, 505 F.3d at 879. Furthermore, the applicable law must have been “well defined,
16 explicit, and clearly applicable.” *Id.* at 880. Thus, “mere allegations of error are
17 insufficient.” *Id.* at 879.

18 Miner concedes that it withheld \$201,000 from Kepner “as its estimated damages”
19 in connection with the Zone-39 Project. (Doc. 1 at 6.) Though the contract between the
20 parties had a clause requiring payment within thirty days, Miner asserts that in the years
21 that Miner and Kepner did business together, Kepner never enforced that clause. (*Id.* at
22 8.) Thus, Miner claims, Kepner waived its right to timely payment and was required to
23 notify Miner of its intent to enforce the clause before bringing suit on it. (*Id.*)

24 The arbitrator found that there was “not sufficient evidence that Dana Kepner
25 actually had a custom and practice contrary to its Standard Terms and Conditions for
26 Sale.” (Doc. 1-D at 12.) Miner contends that the arbitrator “completely ignored the law”
27 in finding that Kepner had not waived timely payment, but in making its argument
28 objects primarily to the arbitrator’s failure to take into account certain evidence. (Doc. 1

1 at 8.) Discounting evidence does not constitute manifest disregard of the law, and an
2 arbitration award cannot be vacated “even in the face of erroneous findings of fact.”
3 *Kyocera*, 341 F.3d at 997. Miner has not demonstrated that the arbitrator acted in a way
4 that would justify this Court’s vacation of the arbitration award. Miner’s Petition is
5 denied on this ground.

6 **III. Miner’s Tort Claims**

7 Miner contends that the arbitrator’s finding against Miner on its claims of
8 fraudulent misrepresentation are “unsupported by law.” (Doc. 1 at 9.) It points to Arizona
9 case law setting out the definition of fraudulent concealment and argues that the
10 arbitrator’s decision in Kepner’s favor “ignored case law and evidence” supporting
11 Miner’s position. However, the Preliminary Order indicates that the arbitrator thoroughly
12 analyzed Miner’s fraudulent misrepresentation claim and found that any statement or
13 omission by Kepner’s representative would “not be a misrepresentation since [the
14 representative] believed that the [problems with the pipe] were caused by that contractor,
15 not ACIPCO’s pipe products.” (Doc. 1-D at 10.) There is no indication that the arbitrator
16 deliberately ignored well-defined law. Miner appears to disagree with the evidence on
17 which the arbitrator chose to rely in making his decision, but that is not grounds for
18 vacating an arbitration award. Miner’s Petition on this ground is therefore denied.

19 **IV. Miner’s Negligent Misrepresentation Claim**

20 Miner argues that the arbitrator was “analyzing the [negligent misrepresentation
21 claim] on the wrong elements.” (Doc. 1 at 11.) Miner argues that the elements of
22 negligent misrepresentation under Arizona law are “(1) supplying false information (2)
23 for another’s guidance in its business transactions.” (*Id.*) Thus, Miner argues, the
24 arbitrator was ignoring the law because he placed undue emphasis on the fact that the
25 Kepner representative was not negligent in reaching his belief that the previous pipe
26 problems were caused by contractor error. (*Id.*)

27 In fact, the case that Miner cites states that one of the elements of negligent
28 misrepresentation is that the defendant must “fail[] to exercise reasonable care or

competence in obtaining or communicating the [false] information.” *Sage v. Blagg Appraisal Co., Ltd.*, 221 Ariz 33, 35, 209 P.3d 169, 171 (App. 2009). As such, the arbitrator’s finding that there was “no evidence in the record that [the representative] was negligent in reaching his belief that the . . . leaks were caused by contractor error” was entirely appropriate. Miner has pointed to no other evidence that the arbitrator manifestly disregarded clearly established law in deciding against Miner on the negligent misrepresentation claim. Thus, Miner’s Petition is denied on this ground.

V. Award of Fees and Costs

Miner contends that the arbitrator exceeded the scope of his authority in awarding Kepner fees and costs. (Doc. 1 at 11.) In determining whether an arbitrator exceeded his power, “courts must not decide the rightness or wrongness of the arbitrator[‘s] contract interpretation” and “must accord considerable deference to the arbitrator’s judgment.” *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019, 1024 (9th Cir. 1991). A court may vacate an arbitration award on grounds of exceeding authority only “when the award is completely irrational.” *Kyocera*, 341 F.3d at 997 (internal quotations omitted).

Here, Miner contends that the arbitrator should have applied A.R.S. § 12-341.01(A) and allowed Kepner to recover fees for “only claims arising out of contract.” (Doc. 1 at 11.) That statute states that “[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney’s fees.” A.R.S. § 12-341.01(A). The arbitrator considered this argument and decided that “A.R.S. § 12-341.01 is not applicable” because the parties agreed, in their Submission Agreement, that the arbitrator could determine attorneys’ fees and costs and that there would be no cap on the amount of the award. (Doc. 1-L at 3, 6.) Furthermore, the Submission Agreement stipulated that the arbitration would be conducted pursuant to the AAA Arbitration Rules, and those rules expressly authorize an award of fees. (*Id.* at 2, 6.) Under Arizona law, “when a contract has an attorney’s fees provision it controls to the exclusion of the statute.” *Lisa v. Strom*, 183 Ariz. 415, 418 n.2, 904 P.2d 1239, 1242 n.2

1 (App. 1995). As such, the arbitrator did not manifestly disregard the law in determining
2 that A.R.S. § 12-341.01 was inapplicable.

3 Miner also claims that the arbitrator misinterpreted the terms of the contract. It
4 asserts that Kepner's Standard Terms and Conditions provide that Miner will "pay all
5 reasonable costs of collection,' not attorneys' fees and costs incurred in litigation." (Doc.
6 1 at 12.) The arbitrator examined this argument and found that the Submission
7 Agreement, providing for attorneys' fees and costs to be awarded by the arbitrator, was
8 controlling rather than Kepner's Standard Terms and Conditions. (Doc. 1-6 at 3.)
9 Moreover, as Miner later concedes, even Kepner's Standard Terms and Conditions
10 provided that the buyer would be responsible for "a reasonable sum for attorney fees."
11 (Doc. 22 at 7.) The arbitrator's decision to apply the Submission Agreement, which was
12 the governing document for the arbitration process, cannot be characterized as
13 "completely irrational." *Kyocera*, 341 F.3d at 997.

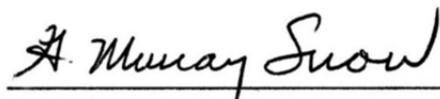
14 Miner also argues that the arbitrator improperly relied on "the inconclusive email
15 dialogue between the attorneys" to "govern the issuance of fees and costs." (*Id.*) The
16 arbitrator apparently relied on the email chain as evidence of the parties' intent in
17 interpreting the Submission Agreement. (Doc. 1-L at 3.) It did not, as Miner suggests,
18 rely solely on the email chain to determine whether to award Kepner fees and costs. The
19 arbitrator's reliance on the email chain to determine the parties' intent was not
20 "completely irrational" and the Court does not find that he exceeded the scope of his
21 powers in so doing.

22 Miner further asserts that the arbitrator improperly found that the Submission
23 Agreement contained a fee-shifting arrangement. It argues that the arbitrator "clearly
24 exceeded his authority" "[b]y employing a straight 'prevailing party' analysis with no
25 provision permitting such an expansive reading." (Doc. 22 at 10.) The arbitrator
26 considered Miner's argument that there could be no fee-shifting because no express
27 clause provided for it in the Submission Agreement. He found, however, that Miner
28 should have limited the language of the Submission Agreement to allow only recovery of

1 “the costs of collection” if it wanted to preserve its right to argue that the Agreement
2 precluded fee-shifting. (Doc. 1-L at 4.) The language of the Submission agreement
3 expressly provides that the arbitrator will determine “the amount of attorneys’ fees and
4 costs (or costs of collection).” Given this language, the Court does not find the
5 arbitrator’s determination that fee-shifting was permitted “completely irrational.” The
6 arbitrator’s interpretation is entitled to a substantial amount of deference, and in this case
7 his reading of the Agreement was reasonable. The Court therefore declines to vacate the
8 arbitration award on the ground that the arbitrator exceeded the scope of his authority.
9 Miner’s Petition to Vacate Arbitration Award is therefore denied.

10 **IT IS THEREFORE ORDERED** that A. Miner Contracting, Inc.’s Petition to
11 Vacate Arbitration Award and Award of Fees and Costs (Doc. 1) is **DENIED**. The Clerk
12 of Court is directed to terminate this action.

13 Dated this 20th day of December, 2012.

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16 G. Murray Snow
17 United States District Judge
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